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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANTELOPE VALLEY HOSPITAL DISTRICT,
Petitioner,

v.

LANCASTER COMMUNITY HOSPITAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Antelope Valley Hospital District ("Petitioner") seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this case on July 15, 1991. *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). The Ninth Circuit's decision reversed an order of the United States District Court for the Central District of California granting summary judgment in favor of Petitioner on antitrust claims asserted by Lancaster Community Hospital ("Respondent" or "Lancaster").

Respondent's original complaint alleged that Petitioner and Respondent compete in providing hospital services in the area designated by the California Office of Statewide Health Planning and Development as Health Facilities Planning Area ("HFPA") 991. The gravamen of Lan-

caster's complaint was that Antelope Valley Hospital Medical Center ("AV Hospital"), which is owned and operated by Petitioner, has sought to exploit its monopoly over perinatal services to increase its market share in non-perinatal hospital services. Specifically, Lancaster alleged that AV Hospital exploited its monopoly power over perinatal services by requiring health maintenance organizations ("HMOs") to have all or a portion of their enrollees use AV Hospital's non-perinatal services as a condition precedent to entering into a contract with AV Hospital.

California HMOs are required by law to contract with each hospital where their enrollees are regularly admitted. Lancaster alleged that HMOs wishing to operate in HFPA 901 needed to contract with AV Hospital because AV Hospital was the only hospital in the relevant geographic market which offered perinatal services—services which, for all practical purposes, must be made available by HMOs to their enrollees. Accordingly, HMOs in the relevant market had no practical alternative but to use AV Hospital for enrollees requiring perinatal services. Lancaster alleged that by refusing to contract with HMOs unless they agreed to send all or a substantial portion of their non-perinatal enrollees to AV Hospital, Petitioner sought to restrict competition on the merits in the market for non-perinatal inpatient medical/surgical services.

AV Hospital moved for summary judgment solely on the basis of state action immunity without contesting Lancaster's factual allegations.[1] Accordingly, the anti-

[1] Petitioner disingenuously suggests that "[b]ecause the case came to the Court of Appeals on summary judgment, [it] had not had an opportunity to demonstrate the reasons it took the actions of which Respondent had complained." Pet. at 13 n.8. It was, of course, Petitioner which elected to limit its motion for summary judgment on Lancaster's antitrust claims to the state action issue. Petitioner's eleventh hour effort to place before this Court a self-serving rendition of "facts" allegedly supporting other defenses is highly improper. Such assertions were not part of the record before

competitive purpose and effect of AV Hospital's conduct must be presumed for purposes of this petition. In reversing the District Court's order granting summary judgment, the Ninth Circuit Court of Appeals found that the anticompetitive conduct forming the basis of Lancaster's complaint was not shielded by the state action doctrine.

In seeking discretionary review of the Court of Appeal's decision, Petitioner has misapplied decisions of this Court and has attempted to contrive a conflict among the circuits that does not exist. For the reasons set forth below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S CONCLUSION THAT PETITIONER'S CONDUCT WAS NOT EXEMPT FROM THE ANTITRUST LAWS RESULTS FROM PROPER ANALYSIS OF THE STATE ACTION DOCTRINE

Petitioner strains to characterize the Ninth Circuit's decision as inconsistent with this Court's state action cases. In doing so, Petitioner misconstrues and disregards fundamental elements of the state action doctrine.

The threshold issue in state action analysis is not simply whether the complained of conduct was authorized. To trigger the state action doctrine, the party seeking to invoke the defense must demonstrate that the authorization is pursuant to a " 'clearly articulated and affirmatively expressed . . . state policy' " to " 'displace competition with regulation or monopoly public service.' " *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 413 (1978), *quoted in, Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).

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either the District Court or the Court of Appeals and would, in any event, be vigorously contested by Lancaster. Accordingly, the purported proffer set forth in footnote 8 of the Petition should be disregarded by this Court.

Petitioner's contention that "[t]he decision of the court below disregards the standard enunciated by the Court in *City of Lafayette* and *Town of Hallie*," Pet. at 11, is simply wrong. After examining a variety of Wisconsin statutes "in some detail," *Town of Hallie*, 471 U.S. at 40-41, this Court concluded in *Town of Hallie* that the "statutes evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services." *Id.* at 44. Nothing in *Town of Hallie*, however, suggests that the Court substituted mere authorization for the requisite state policy to displace competition. Rather, the Court inferred from the fact that the State of Wisconsin delegated to the City the authority to construct and maintain sewage treatment facilities—which expressly included the discretion to serve whomever the City pleased—that the state had contemplated that anticompetitive effects would result. In short, authorization is a necessary, but not—standing alone—sufficient component of the state action doctrine. What must also be shown is that the state intends to displace competition. *See* Ninth Circuit Decision at App. 5a n.4.

Unfortunately, Petitioner persists in attempting to truncate the proper inquiry by arguing that it is foreseeable from the mere "grant of authority to act in an area that [a] governmental entity will take anticompetitive actions related to that activity." Pet. at 14. Authorization, however, is simply the first step in the analysis. As *Town of Hallie* requires, and as the Ninth Circuit plainly recognized, the ultimate focus goes beyond the relatively straightforward question of authorization to the second critical question: "whether the state's policy is to supplant or support competition in the area of dispute, albeit paying particular attention to the foreseeable or logical consequences of a state's grant to a delegate of broad authority." Ninth Circuit Decision at App. 7a-8a.

While it is not necessary for a local governmental entity seeking state action immunity to point to an explicit

statement by the legislature that it "intends for the delegated action to have anticompetitive effects," *Town of Hallie*, 471 U.S. at 43, it is also not enough to point simply to legislative authority to act where, as here, the legislature has plainly adopted a policy to promote—not displace—competition.

Nonetheless, Petitioner argues that its "broad authority to provide hospital services in and of itself establishes authority to exclude others from providing hospital services." Ninth Circuit Decision at App. 7a.[2] In effect, Petitioner asks this Court to ignore direct evidence of California's policy regarding competition among hospitals, limit the analysis to the threshold issue of authorization to act, and rely on indirect evidence as to the state's policy which, Petitioner contends, is to be inferred from AV Hospital's enabling legislation. "In [AV Hospital's] view we can do no more than lay the language of their authorization alongside the language of the authorization provided the City of Eau Claire in *Town of Hallie*. If the language of [AV Hospital's] grant is as broad as Eau Claire's, we are to find the defendants are exempt from the antitrust laws." *Id.*

The Ninth Circuit quite properly declined Petitioner's invitation to depart from the principles of state action analysis established by this Court. In so doing, the Court of Appeals correctly observed that *Town of Hallie* itself "does not support defendants' mechanistic position." Ninth Circuit Decision at App. 7a. Petitioner's approach,

[2] In a footnote, Petitioner appears to challenge the Court of Appeals' characterization of its position quoted above by denying that Petitioner was accused of excluding others from providing hospital services. Pet. at 8 n.6. This contention is puzzling in light of the allegations of the Complaint in this action, which include, *inter alia*, monopolization and attempted monopolization of the relevant hospital services market, along with tying and exclusive dealing. The Complaint also alleges that AV Hospital acted with monopolistic intent. The purpose and effect of such monopolistic conduct is, of course, inherently exclusionary.

which would end the analysis upon a showing of authorization to act—without giving direct consideration to the state's policy regarding competition in the area of dispute, cannot be squared with *Town of Hallie*. Even in *Town of Hallie*, as the Court of Appeals noted, the Supreme Court did not confine itself to legislation authorizing the City of Eau Claire to construct sewer systems in determining the presence or absence of a policy to displace competition.[3] Ninth Circuit Decision at App. 8a.

In sum, AV Hospital plainly has been authorized by the California legislature to do what is necessary to provide hospital services. Based on that authority, Petitioner urges this Court, as it did those below, to assess that authorization in a vacuum and not trouble itself with the ultimate issue: "whether the state's policy is to supplant or support competition in the area of dispute." *Id.* at App. 7a. Such truncated state action analysis cannot be reconciled with *Town of Hallie*.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

In its effort to characterize the Ninth Circuit's decision as conflicting with decisions of other circuits, Petitioner relies principally on two cases: *Paragould Cablevision*,

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[3] In addition to the Wisconsin statute authorizing cities to construct, add to, alter and repair sewage systems, Wis. Stat. § 62.18(1) (1982), the Supreme Court also considered state legislation governing city operated public utilities generally, as well as a statute authorizing Wisconsin's Department of Natural Resources to regulate city sewer operations. *Town of Hallie*, 471 U.S. at 41, 42 n.5. The *Town of Hallie* Court also considered a decision rendered by the Wisconsin Supreme Court in a similar case brought by the Town of Hallie under Wisconsin's state antitrust laws. While noting that the Wisconsin Court's antitrust opinion does not, of course, determine the city's immunity under the federal antitrust laws, the Supreme Court found the Wisconsin opinion "instructive on the question of the state legislature's intent in enacting the statutes relating to the municipal provision of sewage services." *Id.* at 44-45 n.8.

Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir.), *cert. denied*, 112 S. Ct. 430 (1991) and *Allright Colorado, Inc. v. City of Denver*, 937 F.2d 1502 (10th Cir.), *cert. denied*, 60 U.S.L.W. 3404 (U.S. Dec. 3, 1991) (No. 91-572). Neither of these cases reach results that are inconsistent with the Ninth Circuit's analysis.

In *Paragould Cablevision*, the parties did not dispute that the City of Paragould was authorized by the State of Arkansas to enter the cable television business. Such authorization necessarily provided the city-owned cable television system with a competitive advantage by virtue of its access to the existing governmental infrastructure including, *inter alia*, rent-free office space, trucks and equipment, computerized demographic information, rights of way and utility poles. *City of Paragould*, 930 F.2d at 1314.

The Eighth Circuit held that a sufficient state policy to displace competition had been demonstrated because the challenged restraint was a necessary and reasonable consequence of the city's statutorily authorized entry into the cable television business. In reaching this conclusion, the Court found:

> If the Arkansas legislature did not intend the utilization of these resources and the resultant benefit of being able to supply cable services with diminished overhead costs, it would have tailored the enabling statutes accordingly. Because of the nature and extent of municipal operations, the displacement of competition necessarily results *whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies.*

Id. (emphasis added).

In short, the Eighth Circuit's conclusion that the city's conduct was undertaken pursuant to a state policy to displace competition was linked explicitly to the Court's recognition that the state had authorized the city to enter

an industry with monopolistic tendencies. This aspect of the *City of Paragould* opinion is significant in the context of this case for at least two reasons. First, nothing in the record before the Ninth Circuit would support a finding that the hospital industry in California has "monopolistic tendencies." This, alone, serves to distinguish the instant case from *City of Paragould*, where the monopolistic tendency of the industry entered by the municipality contributed significantly to the Court's conclusion that state action doctrine was properly invoked.

Second, the Eighth Circuit's reference to the monopolistic tendency of the industry before it is entirely consistent with the Ninth Circuit's discussion of other cases —e.g., those involving utilities and natural monopolies— where it has upheld state action defenses. Ninth Circuit Decision at App. 9a-10a. In these circumstances, Petitioner's argument that the Ninth Circuit's reference to industry structure is both unprecedented and inconsistent with the law of other circuits, does not withstand even cursory examination.

Moreover, the Eighth Circuit's reference in *City of Paragould* to what the Arkansas legislature could have done had it sought to evidence a different intent regarding competition is also instructive. As recognized by the Ninth Circuit in this case, California has passed a number of amendments to the local hospital district law which contemplate that the district hospitals "operate in a competitive environment." Ninth Circuit Decision at App. 13a n.12. *See also Yoffie v. Marin Hospital District*, 193 Cal. App. 3d 743, 238 Cal. Rptr. 502 (1987). Equally significant is the fact that the California legislature has elsewhere demonstrated its ability to create explicit antitrust exemptions where it intends to do so.

In *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755 (9th Cir. 1986), for example, the Ninth Circuit noted that the California legislature had

amended the state's Emergency Medical Services Act as follows:

> It is the intent of the Legislature in enacting this section . . . to prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under this division.

Mercy-Peninsula Ambulance, 791 F. Supp. at 758 n.2 (quoting Cal. Health & Safety Code § 1797.6(b) (West Supp. 1986)). Had the California legislature sought to exempt district hospitals from the federal antitrust laws, it would presumably have done so in the manner demonstrated above for emergency medical services, or as when it sought to confer such an exemption on "the formation of groups and combinations of purchasers, payers, and institutional and professional providers of health care services for the purpose of creating efficient-sized contracting units." Cal. Ins. Code § 10133.6 (West Supp. 1991).

Allright Colorado, a recent Tenth Circuit case to which Petitioner seems to attribute much significance, likewise fails to reflect a conflict between the circuits. First, the analytic approach employed by the Tenth Circuit is indistinguishable from that employed by the Ninth Circuit in this case. The Tenth Circuit, quoting *Town of Hallie* and *City of Lafayette*, began its state action discussion as follows:

> Municipalities are shielded from antitrust liability for allegedly anticompetitive acts "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" This court follows a two-part test for evaluating municipal state action immunity. "First, the state legislature must have authorized the action under challenge. Second, the legislature must have intended to displace competition with regulation."

Allright Colorado, 937 F.2d at 1506 (citations omitted). The Tenth Circuit's formulation is essentially identical to that articulated here by the Ninth Circuit:

> We often say that this issue requires a two-step analysis: First, whether the activity complained of is authorized; second, whether the state intends to displace competition with regulation. *See, e.g., Traweek v. San Francisco*, 920 F.2d 589, 591-92 (9th Cir. 1990); *Boone v. Redevelopment Agency*, 841 F.2d 886, 890 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988). In this case there is no question but that defendants were authorized to enter into contracts. We thus turn to the question whether the state has displaced competition with regulation.

Ninth Circuit Decision at App. 5a-6a n.4. Moreover, while noting that the two parts of the municipal immunity analysis "will not always have equal prominence," the Tenth Circuit, like the Ninth Circuit here, emphasized that "[t]he two parts of the inquiry are designed to answer the central question—whether there is a "clearly articulated and affirmatively expressed policy' to displace competition." *Allright Colorado*, 937 F.2d at 1507 n.8 (citation omitted).

To apply this standard, the *Allright Colorado* court then examined the relevant statutes to determine whether they authorized the actions challenged and whether they evidenced the requisite state policy to displace competition in the provision of off-airport shuttle bus parking. *Id.* at 1508. Review of the applicable statutes readily revealed that the municipal entity operating the Denver airport was explicitly granted a broad authority to regulate the removal and embarkation of passengers to and from the airport. In short, there could be no serious dispute that the state had authorized the City and County of Denver to regulate the operations of off-airport parking shuttle bus providers, including those providers offering such services in competition with the defendants. *Id.* at 1508-09. Accordingly, the City was not subject to anti-

trust liability, notwithstanding the fact that it was also in some sense a competitor of the plaintiff. *Id.* at 1510.

In the present case, Lancaster is likewise a competitor of AV Hospital, but unlike the City and County of Denver, Petitioner has been granted no authority by the State of California to regulate the conduct of other hospitals. It is entirely appropriate, therefore, that the Ninth and Tenth Circuits would, after applying the same legal standard to vastly different statutory schemes, reach different conclusions as to the applicability of the state action doctrine. Far from constituting a conflict between the circuits, the cases reflect an entirely harmonious approach to the analysis to be under state action doctrine.[4]

III. THE NINTH CIRCUIT HAS NEITHER CREATED NEW TESTS NOR JEOPARDIZED THE PRINCIPLES OF FEDERALISM UNDERLYING THE STATE ACTION DOCTRINE

Petitioner's argument that the Ninth Circuit has "interposed three new tests," Pet. at 16, into state action analysis is baffling and, in any event, incorrect. Petitioner attempts to convert the Court of Appeals' description and categorization of a number of its prior cases into new tests, but the premise underlying this argument is flawed. Nowhere in its decision does the Ninth Circuit limit the availability of the state action defense in the manner hypothesized by Petitioner. The test remains straightforward and, as shown above, entirely consistent with *Town of Hallie*. A local governmental entity seeking to

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[4] The other case referenced in the text of the Petition in support of the purported conflict among the circuits is also readily distinguishable from the instant case. Nowhere in *Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340 (4th Cir. 1986) is there any suggestion that the State of North Carolina had, like California, taken "numerous concrete legislative actions . . . to enhance competition rather than to replace it" in the provision of hospital services. Ninth Circuit Decision at App. 12a-13a (citation and footnote omitted).

invoke the state action doctrine bears the burden of demonstrating that its anticompetitive conduct was authorized pursuant to a state policy to displace competition. Where, as here, the state has clearly articulated a policy to promote competition among hospitals, general authorization to do business as a hospital simply does not warrant an exemption from the federal antitrust laws. To reach a different conclusion in these circumstances would do violence to the state's specific, unambiguous, procompetitive policy and thus contradict the very principles of federalism which undergird the state action doctrine.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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